

§ 1908.8

29 CFR Ch. XVII (7–1–01 Edition)

(ii) *Inspections.* OSHA will continue to make inspections in the following categories at sites that achieved recognition status and have been granted exemption from OSHA's Programmed Inspection Schedule; and at sites granted inspection deferrals as provided for under paragraph (b)(4)(i)(A) of this section:

- (A) Imminent danger.
- (B) Fatality/Catastrophe.
- (C) Formal Complaints.

(5) When an employer requests consideration for participation in the recognition and exemption program under paragraph (b)(4) of this section, the provisions of § 1908.6(e)(7), (e)(8), (f)(3), and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) *Effect upon enforcement.* (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and correction assistance given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant, shall not be binding upon a compliance officer and need not affect the regular conduct of a compliance inspection or preclude the finding of alleged violations and the issuance of citations, or constitute a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the state consultant's written report to the compliance officer, except to the extent that disclosure of information contained in the report is required by 29 CFR 1910.1020 or other applicable OSHA standard or regulation. If, during a subsequent enforcement investigation, OSHA independently determines there is reason to believe that the employer: failed to correct serious hazards identified during the course of a consultation

visit; created the same hazard again; or made false statements to the state or OSHA in connection with participation in the consultation program, OSHA may exercise its authority to obtain the consultation report.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used as a factor in determining the extent to which an inspection is required and as a factor in determining proposed penalties. When, during the course of a compliance inspection, an OSHA compliance officer identifies the existence of serious hazards previously identified as a result of a consultative visit, the Area Director shall have authority to assess minimum penalties if the employer is in good faith complying with the recommendations of a consultant after such consultative visit.

(Approved by the Office of Management and Budget under control number 1218-0110)

[49 FR 25094, June 19, 1984, as amended at 54 FR 24333, June 7, 1989; 65 FR 64292, Oct. 26, 2000]

§ 1908.8 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under a Cooperative Agreement pursuant to this part for the purpose of providing consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, industrial mix, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under Cooperative Agreements pursuant to this part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA before assignment to work under an Agreement, and annually thereafter, that they

meet the requirements set out in §1908.8(b)(2), and that they have the ability to perform satisfactorily pursuant to the Cooperative Agreement. Persons who have the potential but do not yet demonstrate adequate education and experience to satisfy the RA that they have the ability to perform consultant duties independently may, with RA approval, be trained under a Cooperative Agreement to perform consultant duties. Such persons may not, however, perform consultant duties independently until it has been determined by the RA that they meet the requirements and have the ability indicated. All consultants shall be selected in accordance with the provisions of Executive Order 11246 of September 24, 1965, as amended, entitled "Equal Employment Opportunity."

(2) Minimum requirements of consultants shall include the following:

(i) The ability to identify hazards; the ability to assess employee exposure and risk; knowledge of OSHA standards; knowledge of hazard correction techniques and practices; knowledge of workplace safety and health program requirements; and the ability to effectively communicate, both orally and in writing.

(ii) Consultants shall meet any additional degree and/or experience requirements as may be established by the Assistant Secretary.

(c) *Training.* As necessary, the Assistant Secretary will specify immediate and continuing training requirements for consultants. Expenses for training which is required by the Assistant Secretary or approved by the RA will be reimbursed in full.

§ 1908.9 Monitoring and evaluation.

(a) *Assistant Secretary responsibility.* A State's performance under a Cooperative Agreement will be regularly monitored and evaluated by the Assistant Secretary as part of a systematic Federal plan for this activity. The Assistant Secretary may require changes as a result of these evaluations to foster conformance with consultation policy. If the State policies or practices which require change are such that the State's assurance of correction of serious hazards and of the effectiveness of employers' safety and health programs

is in doubt, the Assistant Secretary may, pending the completion of the changes, suspend recognition of a State's consultative visits as a basis for exemption from compliance inspection as permitted under §1908.7(b)(4).

(b) *Consultant performance*—(1) *State activity.* The State shall establish and maintain an organized consultant performance monitoring system under the Cooperative Agreement:

(i) Operation of the system shall conform to all requirements established by the Assistant Secretary. The system shall be approved by the Assistant Secretary before it is placed in operation.

(ii) A performance evaluation of each State consultant performing consultation services for employers shall be prepared annually. All aspects of a consultant's performance shall be reviewed at that time. Recommendation for remedial action shall be made and acted upon. The annual evaluation report shall be a confidential State personnel record and may be timed to coincide with regular personnel evaluations.

(iii) Performance of individual consultants shall be measured in terms of their ability to identify hazards in the workplaces which they have visited; their ability to determine employee exposure and risk, and in particular their performance under §1908.6 (e) and (f); their knowledge and application of applicable Federal or State statutes, regulations or standards; their knowledge and application of appropriate hazard correction techniques and approaches; their knowledge and application of the requirements of an effective workplace safety and health program; and their ability to communicate effectively their findings and recommendations and the reasons for them to employers, and relevant information, skills and techniques to employers and employees.

(iv) Accompanied visits to observe consultants during onsite consultative visits shall be conducted periodically in accord with a plan established in each annual Cooperative Agreement. The State may also conduct unaccompanied visits to workplaces which received onsite consultation, for the purpose of evaluating consultants. A written report of each visit shall be provided to the consultant. These visits